facie evidence of a debt; but *prima facie* only.[25] It can be attacked, when offered as proof of debt in bankruptcy, upon the ground that it is fraudulent, collusive, unreasonable,[26] unfair or merely erroneous.[27] And if any facts are shown to the court which lead to a suspicion that the judgment was obtained upon a technicality without any foundation in actual or legal liability, the burden is at once cast upon the claimant to prove his claim as any simple debt must be be proved.[28] Having no appellate powers over the proceedings of the court which has rendered the judgment, the allowance or disallowance of the claim founded on the judgment in no way affects the existence or binding effect of the judgment itself.[29] In refusing proof the bankruptcy court is acting on behalf of the true creditors.

P. N. S.

EVIDENCE—PHYSICAL EXAMINATION OF PLAINTIFF—As the amount of litigation in tort claims for damages for injury to the person increases, the question as to whether the court, on application of the defendant, and in advance of trial, has the legal right to order the plaintiff, without his or her consent, to submit to a surgical examination as to the extent of the injury sued for, becomes more practical and more important, especially in view of the fraudulent character of many such claims. The question arose recently in *Atchison Ry. Co.* v. *Melson*,[1] and was answered in the negative.

The question has been a much-mooted one; but in the majority of jurisdictions, it has been resolved in the affirmative.

Research has failed to discover an instance at common law where, in a civil suit for personal injuries, the court, at the instance of the defendant, ordered a physical examination of the plaintiff. This failure is made much of by courts which refuse to order such an examination. The courts which uphold the power reach their conclusion solely by reasoning from analogy. The cases in which a similar power was exercised at common law were those involving the infancy or identity of a party; also in appeals of mayhem. In determining questions of impotence as affecting the validity of a marriage, courts of divorce might order an inspection by surgeons of the person of either party. A similar inspection might also be

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[25] Cases under notes 16 and 21, *supra*.

[26] *In re* Hawkins, *supra*. "Although the judgment is apparently founded upon the compromise of a doubtful claim, yet it is clearly an unreasonable, foolish and absurd compromise such as should not bind all of Hawkins' creditors," *per* Lord Ecker, M. R.

[27] *Ex parte* Kibble, *supra*.

[28] *Ex parte* Anderson, *supra*.

[29] *Ex parte* Lennox, *supra*.

[1] 134 Pac. Rep. 389 (Okl. 1913).

made where a woman, convicted of capital crime, was alleged to be quick with child, it being purposed to avoid the possibility of taking the life of an unborn child for the crime of its mother. In other cases, as mentioned by Coke,[2] "when a man having lands in fee dieth, and his wife soon after marrieth againe, and faines herself with child by her former husband, the writ *de ventre inspeciendo* doth lie for the heire," the purpose being to protect the proper succession to the property of a decedent. The power of courts to subject parties to physical examination in suits for injury to the person, is simply an extension and application of these principles which have been long recognized. Analogy is also drawn from the power which courts of equity have long exercised of compelling a party to produce books, papers and documents in his possession or control and constituting evidence material to a cause, for inspection by his adversary. The courts have disagreed as to whether the extension is legitimate, but the division of opinion is an unequal one. The weight of authority is clearly in favor of the power.

In the leading case of *Union Pacific Ry. Co.* v. *Botsford,*[3] the Supreme Court of United States, speaking through Mr. Justice Gray, said: "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint and interference of others, unless by clear and unquestionable authority of law. . . . The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow." The respect which is ordinarily due a decision by that learned tribunal is, in this case,[4] much discounted by the dissenting opinion of Mr. Justice Brewer, the reasoning of which is very cogent and forcible. He says: "The silence of common law authorities upon the question in cases of this kind proves little or nothing. The number of actions to recover damages in early days, was, compared with later times, limited. . . . The end of litigation is justice. Knowledge of the truth is essential thereto. . . . It is said there is a sanctity of the person which may not be outraged. We believe that truth and justice are more sacred than any personal consideration." And, with like reasoning, Mr. Justice Mitchell said:[5] "Any other rule in these personal injury cases, would often result in an entire denial of justice to the defendant, and leave him wholly at the mercy of the plaintiff's witnesses. In very many cases, the actual nature and extent of the injuries can only be ascertained by a physical examination of the person of the injured party. Such actions were formerly very infrequent, but of late years they constitute one of the largest branches of legal industry, and are not

[2] Co. Litt. 8b.

[3] 141 U. S. 250 (1890).

[4] Union Pac. Ry. Co. v. Botsford, n. 3 *supra.*

[5] Wanek v. Wenona, 78 Minn. 98 (1899).

infrequently attempted to be sustained by malingering on the part of the plaintiff, false testimony, or the very unreliable speculations of so called 'medical experts.'" Following such reasoning, the great majority of our courts recognize the power of trial courts, in the absence of conferring statutes, to require plaintiffs, in actions for personal injuries, to submit themselves to surgical examination in respect thereto.[6] The harmony of courts upon the subject is broken by the dissent of Montana,[7] Oklahoma,[8] and the United States courts,[9] and possibly Indiana [10] and Illinois.[11]

In *Union Pacific Ry. Co.* v. *Botsford, supra,* Mr. Justice Gray refers to the writ *de ventre inspeciendo* as an "ancient practice coming down from ruder ages." But the significance of the writ *de ventre* is this, that in an epoch and a country where landed rights were a paramount and constant concern in litigation, the courts were not deterred by a false delicacy from taking such measures as common sense required for determining the truth. Therefore, in our modern community, where the various mechanical applications of natural force have added a thousand dangers to life and limb, and where actions for personal injuries now fill the prominent place once occupied by *formedon in reverter* and *ejecto firmae,* the same common sense should be invoked to apply the same expedients amid our changed conditions. There is the added consideration that corporal injuries are today notoriously a subject of frequent fraud and misrepresentation.[12] The argument that it involves a violation of the right to personal liberty and privacy, that its application to sensibilities of refined and delicate women will be shocked and their dignity trespassed upon, has little force, and is based upon considerations which are purely sentimental. Much may safely be intrusted to the discretion of the courts, and in their hands these rights and sensibilities will be properly safeguarded, and will yet, as they should, be subordinate in importance and sacredness to the interests of justice.

Y. L. S.

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[6] King v. State, 100 Ala. 85 (1893); St. Louis R. R. Co. v. Dobbins, 60 Ark. 481 (1895); Richmond Ry. Co. v. Childress, 82 Ga. 719 (1889); Schroeder v. Chicago R. R. Co., 47 Iowa 375 (1877); Ottawa v. Gilliland, 63 Kan. 165 (1901); Belt Co. v. Allen, 102 Ky. 551 (1898); Graves v. Battle Creek, 95 Mich. 266 (1893); Wanek v. Wenona, 78 Minn. 98 (1899); Brown v. Chicago R. R. Co., 95 N. W. Rep. 153 (N. Dak. 1903); Miami & Co. v. Bailey, 37 Oh. St. 104 (1881); Hess v. R. R. Co., Pa. C. C. 565 (1882); Lane v. R. R. Co. 21 Wash. 119 (1899); White v. M. Ry. Co., 61 Wis. 536 (1884).

[7] May v. N. Pac. Ry. Co., 32 Mont. 522 (1905).

[8] City v. Altizer, 13 Okl. 121 (1903).

[9] Union Pac. Ry. Co. v. Botsford, n. 3, *supra.*

[10] Pa. Co. v. Newmeyer, 129 Ind. 401 (1891).

[11] St. Louis Bridge Co. v. Miller, 138 Ill. 465 (1891).

[12] See, Wigmore, Evidence §2220.